



Water Policy Interim Committee

64th Montana Legislature

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NADINE SPENCER, Secretary

Aug. 30, 2015

Re: Additional comment for the Future of the Water Court study.

Dear Members,

The attached comment was received recently regarding the WPIC's Future of the Water Court study.

Sincerely,

Jason Mohr, research analyst
Legislative Environmental Policy Office

WATER POLICY INTERIM
COMMITTEE 2015-16

August 29, 2016

Exhibit 18

MONTANA LAND AND WATER ALLIANCE, INC.

**P.O. Box 1061
Polson, MT 59860**

August 28, 2016

Senator Bradley Hamlett, Chairman
Water Policy Interim Committee
P.O. Box 201704
Helena, MT 59620-1704

Dear Chairman Hamlett:

The Montana Land and Water Alliance (Alliance) offers the following comments and suggestions to the Committee's *Considerations for the Future of the Water Court and related proposed legislation* under consideration for the August 29 and 30 meeting of the Water Policy Interim Committee (WPIC)

1. Report on the Future of the Water Court

We applaud the WPIC study looking at the future of the Montana Water Court pending the completion of the Montana General Stream Adjudication in 2028. We raise the following issues for your further consideration:

- Election of Water Court Judges: The Committee addressed whether unelected Water Court Judges could be allowed to expand their jurisdiction, and specifically whether the Montana Constitution prohibits the legislature from expanding the Water Court's jurisdiction. The WPIC legal staff concluded that the legislature did have the authority to expand the jurisdiction of Water Court judges based in part on the fact that there have been no successful legal challenges to the judicial structure for the adjudication and administration of water rights.
 - Comment: *The Alliance suggests that this "finding" be revisited and reviewed in light of Article III Section 1 of Montana's Constitution, the Separation of Powers. Section 4 of Article III states that the District Court --with elected judges--shall have "such additional jurisdiction as may be delegated by the laws of the United States and the State". While the legislature may establish courts and determine qualifications for judges, there is no provision in Montana's constitution for the legislature to determine whether an unelected judge can expand its jurisdiction. The Alliance suggests that the expansion of jurisdiction is a matter belonging to the Montana Supreme Court, not the legislature. In any case, just because there has not been a 'successful legal challenge' to the structure for adjudication and administration of water rights in Montana is not a constitutional reason for the legislature's action.*

2. Related Proposed Legislation

The Alliance has specific comments to proposed legislation LCwp04 as follows.

- LCWP04, Limit Analysis of Adverse Effect of Water Right Permit or Change: Section 1. (9).
LCWP04 intends to amend 85-2-306. Part 9 of Section 1 suggests that provisions of this title do not apply within the exterior boundaries of the Flathead Indian Reservation. Likewise Section 2 provides an exception to permit requirements proposed in the bill within the exterior boundaries of the Flathead Indian Reservation. Section 4 of LCWP04 provides that the state or federal government can apply for reservation of state waters, addresses limits to the reservation of waters in any stream course, and part 5(b) of this section limits instream flow reservations to 50% of the average annual flow on record. In Section 14 of LCWP04, which addresses temporary leases of state water, part 17 also creates an exception for applicability of state law within the exterior boundaries of the Flathead Indian Reservation
 - Comment on Section 1 and 2: *Because more than 23,000 non-Indians live within the exterior boundaries of the Flathead Indian Reservation, the Alliance suggests that Section 1(9) and 2(4) will draw legal and constitutional challenges under various provisions of the Montana Constitution, and recommends that these provisions be struck from the proposed bill.* In addition, on its face the administrative provisions of MCA 85-20-1902 are *not enforceable* until the Compact is approved by Congress, the Montana Water Court, and the Tribes. That approval is likely years away and there is no guarantee that what returns from Congress will be anything like the administrative provisions 85-20-1902. Finally, there are provisions within the administrative portions of 85-20-1902 that, if approved by Congress and the Water Court which already exempt the Flathead Indian Reservation from all current and future provisions of Montana water law.
 - Comment on Section 4: The state of Montana has already proposed instream flow reservations in the CSKT Compact for streams off the Flathead Indian Reservation that are more than the 50% limit, for example, in the Kootenai and Swan Rivers. *The Alliance suggests that the 50% limitation be applicable only where the Department of Natural Resources and Conservation can prove no adverse impact to current water users or future uses in the watershed in accordance with the Private Property Protection Act, relevant provisions of the Montana Environmental Quality Act, and required NEPA/MEPA studies before the commencement of implementation of the CSKT Compact.*
 - Comment on Section 14. *Because the provisions of the CSKT Compact that permit the leasing of water are not enforceable until the Compact has received Congressional, Water Court, and Tribal approval, the Alliance suggests that this provision be struck from the proposed bill.* As stated in our comments to section 1 and 2 of this bill above, there is already a provision in the CSKT Compact that disallows the application of current and future revisions of Montana water law to the waters governed under the CSKT Compact.

In general, we would advise the WPIC to eliminate any provision that specifically applies to the proposed and congressionally non-ratified CSKT Compact. Not only will these provisions jeopardize the passage of this legislation because of the likely constitutional and legal challenges, but are patently irrelevant to state law at this time. Moreover, if the Compact is ratified in its present form by Congress and the Montana Water Court, there are already provisions in MCA 85-20-1920 that exempt the CSKT from the application of all Montana water laws, present or future.

Finally, we note for the record that the WPIC's report fails to acknowledge that the CSKT Compact or SB 262 is currently in litigation with a direct challenge to the constitutionality of the legislature's vote. As such, no legislation exempting the waters, lands, or water rights of the CSKT Compact is relevant at this time.

Sincerely,

/s/ Catherine Vandemoer

Catherine Vandemoer, Ph.D.
Chair, Montana Land and Water Alliance
Polson, MT